BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A

Opinions of the Courts Below

The opinion of the New York Court of Appeals is officially reported, 287 N. Y. 154, and is unofficially reported in 38 N. E. 2d 478. It appears in the record at pages 79 to 81.

The opinion of the County Court of Suffolk County is reported in 27 N. Y. S. 2d 241, and officially reported in 175 Misc. 989, and appears in the record at page 69.

B

Jurisdiction

1. *Timeliness.*

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)].

The remittitur of the New York Court of Appeals was entered of record and issued on December 5, 1941. (R. 81-83) The County Court entered judgment on the remittitur February 21, 1942. R. 83-84.

The petition for writ of certiorari is filed herein before the expiration of three months from the date the decree and judgment of said New York Court of Appeals was rendered and entered, which is within the time allowed by law.

2. *The statute.*

The validity of state legislation under the United States Constitution was drawn into question in this case and the decisions of each of the courts below, to wit, the New York Court of Appeals and the County Court of Suffolk County, New York, were wrongfully in favor of its validity.

The legislation challenged here is an ordinance of the Village of Southampton which was in full force and effect at the time of the transaction in question. Said ordinance appears in full at pages 4, 5, supra. See R. 17, 69-70.

In holding that the ordinance is not unconstitutional because it abridges freedom of speech, press and worship in violation of the Fourteenth Amendment to the United States Constitution, the New York Court of Appeals held that the ordinance properly applied to the activity of petitioners and decided in favor of its validity on its face and as so applied. R. 79-81.

Petitioners duly and properly urged in all the courts below that the said ordinance on its face and especially as construed and applied to them was invalid because it deprived them of above described rights contrary to the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

From the very beginning, therefore, the validity of the legislation here challenged as being in contravention of the Fourteenth Amendment was thus drawn in question. The judgments of the trial court and the County Court of Suffolk County were in favor of the validity of such ordinance, and the New York Court of Appeals found in favor of the validity thereof, affirming the judgment of the County Court and of the trial court.

C

Statement of the Case

A full statement of the case has been given herein (supra, pages 2 to 7), and for the sake of brevity will not be repeated but is here referred to.

D

Specification of Errors

Petitioners assign the following errors in the record and proceedings of said case:

The Court of Appeals committed fundamental error in affirming the decision of the County Court affirming the judgment of the Court of Special Sessions by ruling that the petitioners were guilty of a violation of said ordinance of the Village of Southampton, because the said ordinance is invalid on its face and as construed and applied by the courts below, in that it deprives petitioners of their rights of freedom of press, of speech, of conscience, and of freedom to worship Almighty God as by Him commanded in the Bible, and is an unreasonable and arbitrary exercise of the police power of the State and Village contrary to the "due process" clause of the Fourteenth Amendment to the United States Constitution, and also violates the "equal protection" clause of the Fourteenth Amendment by discriminatory improper classification predicated upon six months' residence in the Village as a condition precedent to exercise of rights guaranteed and secured by the Fourteenth Amendment.

And for these reasons it is reversible error for the Court of Appeals to affirm the judgment of the County Court of Suffolk County affirming the judgment of conviction rendered by the Court of Special Sessions of the Village of Southampton, and to hold that the ordinance was valid and constitutional.

The courts below erred in holding that the ordinance as applied was a proper and valid exercise of the police power.

Points for Argument

FIRST

Ordinance No. 28 of the Village of Southampton is unconstitutional and void, both on its face and as construed and applied to petitioners, in that it unreasonably and unlawfully deprives them of freedom to worship ALMIGHTY GOD, Jehovah, and freedom of conscience, of speech, of press, and of assembly, all contrary to Section 1, Fourteenth Amendment to the Federal Constitution.

SECOND

Ordinance No. 28 of the Village of Southampton is unconstitutional and void on its face and repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution in that the part of the ordinance prohibiting entry upon property of another without obtaining express prior consent of the occupant is unreasonable, and arbitrarily makes unlawful that which is inherently lawful, and deprives persons of liberties and privileges constitutionally safeguarded against State invasion, without due process of law, and amounts to legislation by individuals in that it vests each householder with the right to determine whether or not the ordinance shall be enforced, all of which is in excess of the police power of the village conferred by statutes of the State of New York.

THIRD

Ordinance No. 28 of the Village of Southampton is unconstitutional and repugnant to the "equal protection" clause of the Fourteenth Amendment to the Federal Constitution, in that it is unjustly discriminatory and imposes an improper classification predicated upon residence of six months in the village as a condition precedent to the exercise of rights guaranteed and secured by the United States Constitution.

ARGUMENT

The first case following that of *Town of Green River* (Wyoming) v. *Fuller Brush Co.* (65 F. 2d 112; 1933) was *City of Orangeburg* (S. C.) v. *Farmer* (1936) (181 S. C. 143), which dealt with a like ordinance and also a Fuller Brush Co. salesman. The court refused to accept the reasoning of the *Green River* case and held the ordinance unconstitutional, saying—

> "The occupation of soliciting orders from house to house is a lawful one when conducted in a proper manner. The ordinance does not attempt to differentiate between salesmen who conduct themselves properly and those who do not. The ordinance . . . simply and boldly declares a lawful occupation a nuisance. . . . The ordinance is unreasonable, unconstitutional on this ground, and void."

The next case (*Jewel Tea Co.* v. *Bel Air,* 172 Md. 536; 1937) dealt with a combination Green River type of ordinance and exemptions granted to local merchants or farmers or "any one duly licensed". The court found the ordinances "void because they discriminate against the non-resident

in favor of the resident business and thus violate the Fourteenth Amendment to the Federal Constitution."

In *Prior* v. *White* (a Florida case), 180 So. 347, 1938, the person solicited by the Fuller Brush salesman admitted him to her house and eventually bought his merchandise. The court declared that, inasmuch as "invitation . . . may be implied from custom, usage or conduct, . . . as applied to this petitioner and the act or practice of soliciting orders for the sale of goods, wares and merchandise the ordinance is unreasonable and invades the petitioner's constitutional rights."

White v. *Town of Culpeper,* 172 Va. 630; 1939, like the Jewel Tea Company case was a combination of Green River ordinance against solicitation and the licensing of peddlers. The solicitor was a Real Silk salesman. The court said:

> "The ordinance under review is invalid for the reason that it permits peddlers and brokers, who are licensed . . . to do the very thing it prohibits a solicitor from doing. Likewise it accords to local merchants the privilege of soliciting orders from the citizens of the Town of Culpeper. This inconsistent treatment of citizens is admitted proof of the discriminatory character of the ordinance. . . . If the visitation of solicitors merely offends the household, it is, or may be, a private nuisance, but even so it is not punishable as a crime."

In *City of McAlester* v. *Grand Union Tea Co.,* 98 P. 2d 924 (1940), the court said: "The ordinance now considered is not regulatory but preventative and prohibitive as against an act innocent in itself and without surrounding facts or circumstances that would constitute the act a public nuisance."

In *De Berry* v. *City of La Grange,* 8 S. E. 2d 146, 1940, the Georgia Court of Appeals came to the same conclusion, saying,

> "While such solicitor may not be an invitee on the premises, we think usage and custom would constitute him at least a licensee rather than a trespasser where the householder has taken no steps to indicate that such a visit would be objectionable and would be considered as a trespass."

See also the host of cases outlawing this type of ordinance, cited at page ..., supra, this brief.

In other words, the courts have held that the legislature cannot make unlawful that which is inherently lawful and right when no justification therefor is shown. Free movement of the people *for right purposes* should not be hampered or destroyed, as this ordinance does. One's status of 'implied invitee or licensee' cannot be destroyed by legislative fiat without express consent of the persons involved, as is done in this case.

Petitioners are invitees because they were giving the people a message for the benefit of the residents upon a subject matter in which the householders and the appellants had a mutual interest. The subject matter shows insane, demonized persecution of decent, upright, harmless persons throughout the land, its true cause, the result, and a warning appeal to prevent like outrages in Southampton showing why such should be avoided. At the same time this was of general public knowledge and grave concern to all true Americans. Being for their benefit, it is presumed that all residents of good-will toward Almighty God gladly receive the information. There is no record that any of such complained.

In *Meiers* v. *Koch's Brewery*, 229 N. Y. 10, 12-14, the court held that when there was a mutuality of interest in the subject to which the visit relates, or if visitor's purpose is of interest or advantage to the owner, he is an invitee; otherwise he is a licensee. The court continued:

"To entitle one to rely upon an implied invitation to enter, his *purpose* must be of interest or advantage to the owner. . . . 'To come under an implied invitation as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged. . . . There must be *at least some mutuality of interest in the subject to which the visitor's business relates.*' (Plummer v. Dill, 156 Mass. 428)" [Italics added]

See also 33 *American Jurisprudence* 401, par. 94; and *Cudahy Packing Co.* v. *McBride* (CCA Neb.), 92 F. 2d 737. Even one who is a licensee cannot be guilty of criminal trespass. 63 *Corpus Juris,* par. 325, pp. 1086-1087, n. 25.

See also *Restatement of the Law of Torts,* Vol. 1, pp. 402-3.

Here the householder had not orally warned, or had not by writing notified, petitioners, prior to entry, not to enter the premises; or had not posted a sign stating, 'Jehovah's witnesses not wanted; do not enter.' In such eventuality petitioners would have been trespassers and subject to prosecution as such under the Penal Law of New York.

It is true, of course, that a man's home is his castle. This ancient rule of the common law has, however, been greatly modified in recent times. As Justice Holmes has said (*McKee* v. *Gratz,* 260 U. S. 127), "A license [to enter] may be implied from the habits of the country." "A license may be implied to enter the house of another, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life." (37 C. J. 283) The path up to the door of a man's house, the absence of gate or other bar, the steps to the porch and the doorbell or knocker are all in themselves and in accordance with use and wont implied invitations to approach. The man who stands on the porch under such circumstances is not a trespasser under well-established law, but a licensee. (See *Stacy* v. *Shapiro,* 212 App. Div. 723; 209 N. Y. S. 305) *And in the case at bar, be*

it noted, petitioners were not even seeking entry to the house but were merely seeking to leave their leaflets outside the door.

The ordinance does not differentiate between house-to-house callers who conduct themselves properly and those who do not, and declares that the mere lawful act of soliciting or distributing literature from house to house is unlawful. The penalty is not based upon the *conduct* of the individual, but such *activity* is arbitrarily declared to be a nuisance. This character of activity, thus outlawed by the ordinance, is proper, necessary and lawful per se. It also penalizes as a trespass that which is in law and in fact not a trespass. "Trespass" is the going upon or remaining upon property after being notified in some legal way by the owner or his agent that the presence of an individual (or class of individuals) is unwanted or prohibited. A person who is upon the premises of another for a lawful and right purpose without such knowledge, is usually termed a "licensee" and does not become a "trespasser" until knowledge has been brought home to him.

One who is on the premises of another at the express or implied invitation of the owner is termed an "invitee".

The ordinance in question makes licensees and invitees *trespassers,* contrary to law, which unwarranted assumption of authority is in excess of the "police power". There is no reasonable connection between the motive prompting passage of the ordinance, the means employed, and the end to be attained thereby.

In attempting to justify the ordinance, the Judge of the County Court said that Southampton is an extraordinary village, from the standpoint of great wealth, beautiful residences, scenic grandeur, worldly prominence of residents, world fame, etc. As to this, there is no argument. They also must be specially protected, contended the County Judge, against invasion by persons of criminal tendencies. As to this, there can be little argument; but as to means employed, there is argument. However, we do insist that

those unique qualifications of that village do not isolate it or, in the eyes of the law, elevate it above communities inhabited by the less affluent or the poor, such as the greatest American municipality's Bowery section, or its Manhattan borough's former "East Side". Therefore any unique characteristics of the Village of Southampton in no way affect or determine validity of the ordinance. Even in Southampton constitutional rights of free press, free speech and freedom to worship can rightly be exercised by any person whether a visitor or a resident of the village for six months or more or less. The requirement of six months' residence as a condition precedent to exercise of these fundamental personal and civil rights is capricious and arbitrary discrimination and *abridgment of the rights,* and such legislative provision is repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment, United States Constitution.

The extensive argument made in the court below for respondents, and also by the county judge, stressing certain unique qualifications and peculiarities of the Village and its motives for enacting the ordinance, does not warrant the unconstitutional application of the ordinance to appellants.

All these arguments were made for the State and the Town of Irvington in *Schneider* v. *New Jersey,* 308 U. S 147, where it was contended that the ordinance was needed "in the face of the all too frequent burglaries in the metropolitan section", and "to prohibit canvassing from house to house in the hours of the early morning or after nightfall". See Respondent's brief in that case and also 121 N. J. L. 542; 120 N. J. L. 460.

All such argument was brushed aside by Mr. Justice Roberts, who held the same to be insufficient to justify such attempted regulation, saying,

> " . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of

> speech and press. . . . We do hold, however, that the ordinance in question, *as applied to the petitioner's conduct,* is void, and she cannot be punished for acting without a permit." [Italics added]

The ordinance here in question deprives householders of their inherent personal right to recognize and receive upon their premises any unannounced or uninvited legitimate house-to-house caller. Let us see how the ordinance would actually work. The individuals have a vital message to deliver to the village residents. An invitation must first be secured to call at the residences. Are we to expect the distributor of literature to make a telephone list of all the residents of each street and then telephone each individual resident in an attempt to secure an invitation? Are we to expect the distributor of literature to go along the street shouting, "I have the Gospel, may I come to your door?"

Under the "Green River" type of ordinance a person is prohibited from selling his book except at homes which have given him a prior invitation to call for that purpose. In a town of one thousand homes he would thus have to secure one thousand permits or licenses to circulate his book throughout that community. This is greater denial of freedom of the press than that of the ordinance held invalid in *Lovell* v. *City of Griffin,* 303 U. S. 444. It can be clearly seen that the application of the "Green River" type of ordinance to the work of circulating printed matter denies liberty and would be held invalid by every court that follows this Court's clear declarations and definitions with respect thereto.

In respect to the holding of the court below, that by consent is meant express consent which must be each time separately obtained, thereby an impossible burden is imposed upon the disseminator of ideas. Telephonic requests if attempted to be made would be very burdensome both in time and in money and would doubtless be refused. If indulged in persistently, as the ordinance appears to invite,

they would soon become a pest which another ordinance might some day conceivably seek to regulate. In any event it is completely impracticable and as effectively deprives the pamphleteer or like disseminator of ideas of all right to distribute as though the ordinance contained a downright prohibition.

Suppose that one had literature warning of an invasion by Hitler or warning against 'fifth column' activity, or of the need for selecting competent and fair public officials, and notice to the people were imperative, would the public health, morals and safety be promoted at such a time or any other time by the enforcement of such an ordinance?

Or, suppose one passing through the Village, or who had not resided within its limits the prescribed "six months", saw a chimney afire, should he rightly be prevented by such an arbitrary enactment? NO. The "Green River" type of ordinance does not work in a democracy! Its inherent and basic quality smacks fiercely of that alien and detestable type of legislation best described by the words "authoritarian" and "totalitarian". The people of America have ordained freedom of the press, freedom of communication and inter-communication among themselves. They want nothing that smacks of the totalitarian.

The ordinance amounts to legislation by individuals rather than by the constituted authority because the ordinance can or cannot have effect according to the pleasure of individual occupants of premises, and makes unlawful that which is inherently lawful, in excess of the police power.

By the ordinance the governing body of the Village of Southampton has *unlawfully delegated* to the individual residents of the village the right to determine when and under what circumstances the act of going from door to door shall or shall not constitute violation of the law. This vice of unconstitutional delegation of authority was outlawed in *Ex parte Maynard,* 275 S. W. 1071.

The ordinance imposes an improper classification predicated upon residence, and in operation is unreasonable

because of lack of rational connection between the interdiction of the ordinance and the end ostensibly sought to be accomplished and therefore violates the "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

The requirement of six months' residence in the village as a condition precedent to going from door to door for any lawful purpose is clearly a denial of equal protection of the laws and arbitrary discrimination contrary to the "due process" and "equal protection" clauses of the Fourteenth Amendment. It is to be noted that the prohibited visits are not confined to unlawful visits but also include *lawful* ones. One cannot lawfully be required to reside in a city any length of time as a condition precedent to exercising his right of freedom of speech, press and worship. Such rights can be exercised without residence. The very purpose of the Constitution is to equalize the rights of every individual and make the same enjoyable equally in every state and subdivision thereof, and these rights cannot be taken away by arbitrary fixing of any particular length of time as a condition precedent.

In this connection we are reminded of the opinion of the judge of the county court below in which he expressly says that Jehovah's witnesses are obviously not the type or character of persons who would engage in the criminal activities aimed at by the ordinance in question. Concerning them, he said: "There isn't any question in anyone's mind about the honesty of purpose of the defendants or their freedom from any nefarious scheme. What they were doing was undoubtedly harmless. Maybe it did a lot of people good . . . " R. 73.

Before this Court outlawed an identical "Green River" type ordinance of the City of Jersey City in *Hague* v. *C. I. O.*, supra, a like argument was advanced in a letter sent by that city's corporation counsel to Jehovah's witnesses to dissuade them from subjecting themselves to continuous ar-

rests for violation of the ordinance. The corporation counsel wrote:

> "We appreciate the fact that your work is entirely charitable and benevolent and that it is done, as you state, solely because of your love for God and His Kingdom, and not for pecuniary profit. . . . There can be no discrimination in the enforcement of this ordinance. It has been enforced against everyone as a measure of protection to our citizens, and the validity of the ordinance has been upheld by the Supreme Court of this State. . . . There are of course *many other ways of disseminating your information* which is entirely legal such as the radio, newspapers and the United States Mail." [Italics added]

The very purpose of the "equal protection" clause is to insure equality of freedom of locomotion, travel and commerce for all inhabitants of the states and subdivisions thereof.

This provision of the ordinance amounts to class legislation and discrimination against some and the favoring of others. As an illustration, even all *peddlers* under the ordinance are not treated alike. Resident peddlers are favored over non-resident peddlers. Additionally, the ordinance does not treat equally all persons who, though not peddlers, are desirous of exercising their right of *press activity* within boundaries of the village, i. e., their right to disseminate ideas in printed form.

This Court, in *Truax* v. *Corrigan* (257 U. S. 312, 331-333), said:

> "But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public

opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

The police power, however broad and extensive, is not above the Constitution in obedience to the commands of which the courts will protect the rights of individuals from invasion under the guise of police regulations when it is manifest that such is not the object and purpose of the regulation. Thus the appellees can seek no comfort from the recitations in the preamble to Village Ordinance No. 28 of Southampton. Note that the ordinance does not have for its real purpose the prevention of trespasses. The act of trespass in its quality is not prohibited. On the face of the ordinance, only Jehovah's witnesses living in Southampton may "lawfully" do exactly the same act that, if done by one of Jehovah's witnesses residing in any other community of Suffolk County, would constitute a crime.

The ideas disseminated by those who have been exposed to the Southampton climate for a certain period of time are no more likely to be worth distributing than those of persons less favored. The exception, however it may be looked at, is not only arbitrary, but nonsensical, capricious.

Thus it is obvious that the ordinance does not permit even an extraordinary municipal community of the socially elite to erect a "Chinese wall" excluding a non-resident (or a resident not having 'anchored' in the village for six months or more) from exercising his fundamental civil rights within its boundary.

Obviously, also, if this law be sustained, even the man in the watchtower at Montauk Point, scanning the horizon that he might report indications of danger of threatened invasion by Stukas or Nazi parachutists, could not on dis-

covery, and after fleeing to Southampton, warn its residents, from house to house, of the danger, that they might take timely steps to protect themselves against the real peril, until he himself had resided in the village for half a year after arriving with the alarming news!

Furthermore, we strenuously urge that this ordinance is void *on its face*, because, by its terms, it prohibits the distribution, from house to house, of literature of any kind, whether by gift or sale, which type of attempted regulation was outlawed in the three companion cases joined with *Schneider* v. *State*, supra, which said ordinances were held to be void on their face.

The ordinance on its face and as construed and applied prohibits *circulation* and *distribution*, which are essentially vital to, if not the very life of, freedom of the press; and because thereof it violates the Fourteenth Amendment.

Schneider v. State
supra
Cantwell v. Connecticut
supra
Lovell v. City of Griffin
supra
Carlson v. California
310 U. S. 106
Thornhill v. Alabama
310 U. S. 88

A municipality cannot restrict or prohibit press activity from house to house, as it also cannot restrict such activity on the streets. Mr. Justice Roberts said:

> " . . . And perhaps the most effective way of bringing them [pamphlets] to the notice of individuals is their distribution *at the homes of the people*." [Italics added]

Schneider v. State
supra

The Court of Appeals of the State of New York relies upon the case of *Town of Green River* v. *Fuller Brush Co.*, supra, which is the case that lent its name to this type of ordinance. That case dealt only with door-to-door vendors of merchandise, and the ruling in the case, therefore, that the ordinance was properly invoked as against a vendor of merchandise is not a precedent in this case. But since that identical type of ordinance has been held unconstitutional in almost all subsequent cases, whether applied to door-to-door vendors of merchandise or to free pamphlet distribution, it is worth while to analyze the cases carefully. They divide themselves into those which deal with vendors of merchandise and those which deal with pamphlet distribution, whether advertising or non-commercial.

In the *Town of Green River* case, supra, the ordinance was sustained as valid when applied to the ordinary form of peddling of articles of merchandise, commercially, from house to house. However, that case does not govern here and is distinguishable.

Here the CONTROLLING POINT to be kept in mind at all times is that even a constitutional ordinance or statute may be valid when given one *application* and invalid when given another.

Concordia Fire Ins. Co. v. Illinois
292 U. S. 535, 545

In *Schneider* v. *State*, supra, it was held that valid ordinances regulating commercial peddling of merchandise may be proper for the regulation of distribution or sale of ordinary *merchandise* but would not warrant regulation of dissemination of printed information or argument. The court said:

" . . . Mere legislative preferences or beliefs respecting matters of public convenience may well sup-

port regulation directed at *other personal activities*, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." [Italics added]

The "Green River" type of ordinance has been held inapplicable to the work of Jehovah's witnesses in many cases, several of which are by the lower federal courts. Those courts make clear distinction between the *Fuller Brush* case and the cases involving the wholly unrelated activity of Jehovah's witnesses.

On August 9, 1941, in the Tenth Federal Judicial Circuit where the "Green River" ordinance case originated and was first sustained, the United States District Court declared an ordinance of that type invalid as applied to Jehovah's witnesses, and enjoined its enforcement, saying,

> " . . . 65 Fed. (2d) 112 (CCA 10th), relied upon by defendants, is not in point, for the appellant in that case was engaged in *purely commercial transactions*, to wit, taking orders for goods, and the questions here discussed were not mentioned. The cases already cited show plaintiffs did not come within the definition of the Colorado Springs ordinance. . . .
>
> "We therefore conclude the plaintiffs are entitled to relief on two grounds. First, that the plaintiff, a *minister of the Gospel* [even as Bohnke and Brown in the case here presented for review], *is not within the definition of the ordinance*. And, secondly, *that as applied to him and his calling* and the *acts complained of*, its enforcement deprives him of rights and privileges secured by the Constitution of the United States." [Italics added]
>
> Donley et al. v. City of Colorado Springs
> 40 F. Supp. 15

That very recent *Colorado Springs* case, specifically distinguished by the district court from *Town of Green River v. Fuller Brush Co.* (65 F. 2d 112), follows expressly *Zimmermann et al.* v. *Village of London* (Ohio) (April 25, 1941), 38 F. Supp. 582, restraining enforcement as to Jehovah's witnesses of another "Green River" ordinance. There United States District Judge Underwood held:

> "In the case now before this Court, the ordinance . . . imposes what amounts to a virtual prohibition upon such distribution, and this is stated understandingly, in view of the charges filed by the authorities against these plaintiffs. Certainly there is no prospect under the ordinance for the 'free and unhampered distribution of pamphlets' as envisaged by the Supreme Court. It may be added that freedom of the press contemplates not only the right to print, but also, the right to distribute.
>
> " . . . Although the theory of the ordinance is purportedly trespass, the theory can give no sanction to the denial of fundamental rights under the Constitution. . . .
>
> " . . . The question has been tried only upon the application of the ordinance to these plaintiffs and to those similarly situated engaged in house-to-house distribution of printed matter and of oral and written opinion. As so applied, the Court finds said ordinance *unconstitutional* to the extent that it interferes with such constitutional rights of the plaintiffs and those similarly situated and engaged, and a permanent injunction will issue to restrain the defendants from so enforcing said ordinance."

It is clear, therefore, that the Court of Appeals of the State of New York stumbled into the 'pit of error' while

attempting to 'perform the delicate and difficult task of appraising the substantiality of the reasons advanced' in support of the ordinance in question. That court did not give proper weight to the reasons advanced by petitioners in support of the questions presented.

Conclusion

It is therefore submitted that this case is one calling for exercise by this Court of its supervisory powers, to the end that errors complained of may be corrected, and to such end a writ of certiorari ought to be granted and directed to the County Court of Suffolk County, the court to which the Court of Appeals remitted the record and its opinion, and which Suffolk County Court now possesses the record in this case, so that this Court can review the decisions and judgments of the Court of Appeals of the State of New York, the County Court of Suffolk County, New York, and the Court of Special Sessions of the Village of Southampton, New York.

Confidently submitted,

HAYDEN C. COVINGTON
Attorney for Petitioners

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SUPREME COURT

OCTOBER TERM, 1941

No. 1005

GEORGE BOSKER and MRS. HELEN T. (ELLIS) BOSKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COUNTY COURT OF SUFFOLK COUNTY, STATE OF NEW YORK

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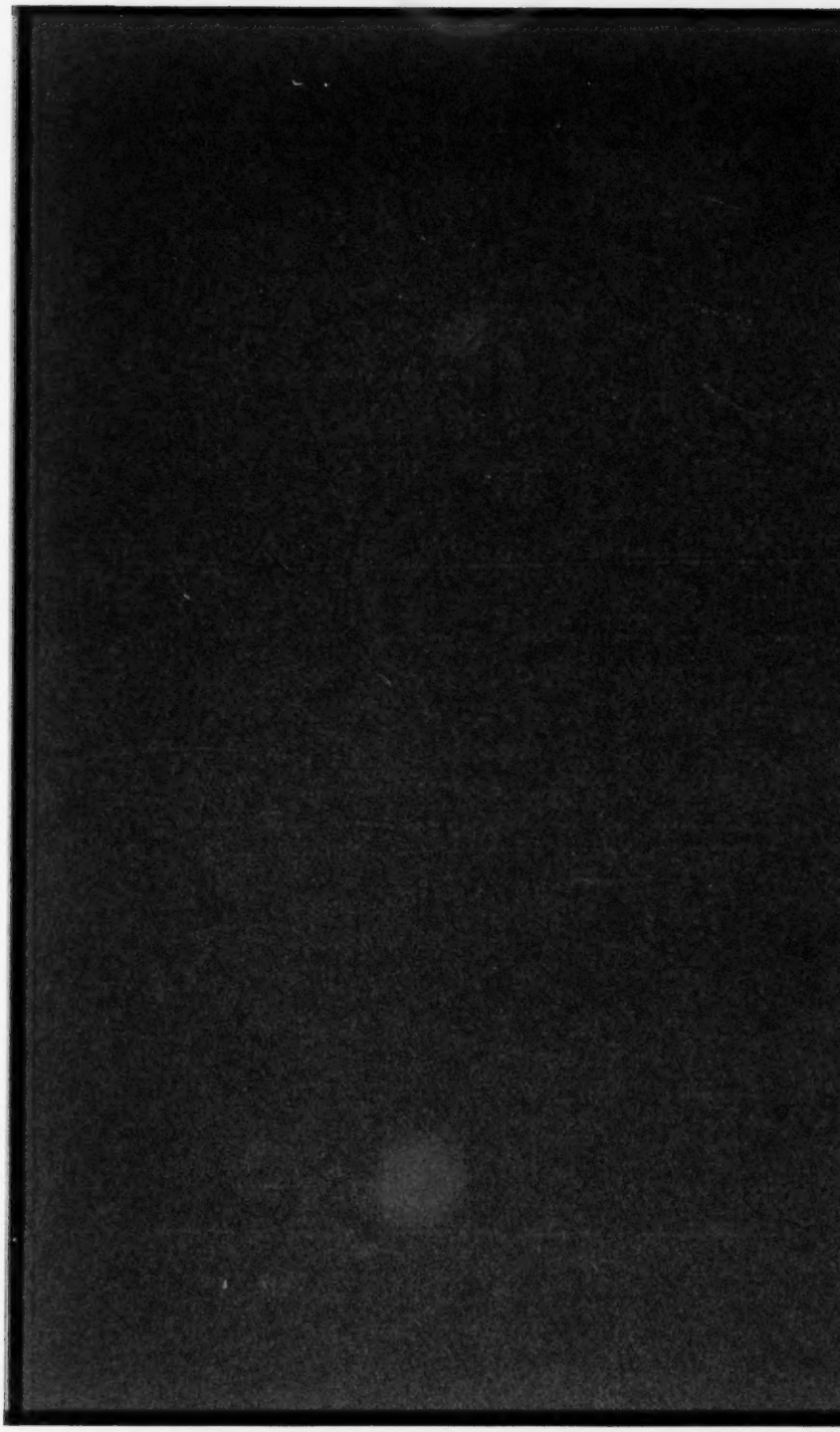

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B

Statement of Case

1. Statement of facts

The facts are undisputed and undenied.

Petitioners are Jehovah's Witnesses. On June 30, 1940, they entered upon private residential property in the Village of Southampton for the purpose of distributing certain tracts or pamphlets, which were introduced in evidence (R. 49), without first obtaining the consent of the occupant of the premises, thereby violating Ordinance 28 of the Village of Southampton. The ordinance is set forth in the record at pages 17, 69 and 70.

2. Federal questions presented

It is the contention of respondents that the ordinance is constitutional and as enacted constitutes a reasonable, proper and lawful exercise of the police power of the Trustees of the Village of Southampton.

Petitioners argue that the ordinance is unconstitutional and void.

C

Summary of Argument

Ordinance No. 28 as enacted constitutes a reasonable, proper and lawful exercise of the police power delegated to the Village of Southampton and is therefore valid.

1. Authority for enactment.
2. Reasonableness of ordinance.
   (a) Application of ordinance.
3. Discussion of petitioners' argument.

D

Argument

The Boards of Trustees of all villages in the State of New York are authorized by the Village Law to regulate the distribution of handbills, tracts, pamphlets and other matter (Village Law, Section 89, subdivision 48, Appendix) and may prohibit trespass and take such measures as they may deem expedient for good government and the general welfare (Village Law, Section 89, subdivision 58-A, Appendix).

It is immediately apparent that the Southampton Village Trustees have considered their problems, and have undertaken to comply not only with our state laws but also with our United States Constitution in effecting the solution of that problem.

It will be noted that this ordinance is limited strictly in its application to private residential property in the Village of Southampton. It does not interfere with, directly or indirectly, the exercise by any person of any sect, of any of his constitutional privileges or immunities, in any public, semi-public or quasi-public place in the Village of Southampton.

No license or permit for the distribution of tracts, pamphlets or literature of any kind is required, no censoring

is indicated or attempted—all that is required is that any person intending to enter upon private residential property for any of the purposes specified in the ordinance shall respect the occupants' inherent rights of privacy and first obtain his permission to enter—a truly reasonable requirement.

Should it be determined that this ordinance is a reasonable one, enacted pursuant to the police powers for the protection of the health, peace, morals and good order of the community, then the constitutional privileges of the petitioners have not been invaded, their religious freedom and freedom of speech and of the press are not infringed and the ordinance must stand.

The scope and boundaries of the Fourteenth Amendment, upon which petitioner has sought this writ, were clearly set forth in the case of *Barbier* v. *Connolly*, 113 U. S. 27, and in discussing them the court said that "neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace and morals, education and good order of the people."

Similar ordinances to the Ordinance No. 28 have been held to be valid and a reasonable exercise of the police power.

In *San Francisco Shopping News Co.* v. *City of South San Francisco, et al.*, 69 Federal Reporter, Second Series, petition for writ of certiorari denied 293 U. S. 606, the court in discussing that ordinance said:

> "As a matter of fact, however, the ordinance in question does not prohibit the business of publishing or distributing paper of the class to which the appellant's product belongs. The ordinance merely forbids the distribution of such publication by placing it into automobile, yard, porch, or mail box 'not in possession or under the control of the person so distributing the same.' The ordinance does not forbid the manual de-

> livery of the publication by the carrier to a member of the household; nor, as the appellees point out, are the United States mails closed to 'Shopping News'. The enactment does not prohibit the conduct of the business in question; it merely seeks to regulate the manner in which the product shall be distributed."

And further:

> "Applying, then, both the principles and the phraseology of the many decisions from which we have quoted herein, we cannot say that this 'police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to preserve the public safety, health and comfort'. That being so, 'the decision of the legislative body is conclusive'.
>
> "Nor can we say that the classification adopted in the ordinance in question is unjust, unfair or unreasonable, for 'the question of classification is primarily one for the legislative power'."

In *Buxbom* v. *City of Riverside, et al.*, 29 Federal Supplement 3, the court, referring to another ordinance similar to that at bar, and specifically to that portion requiring permission to enter before distributing handbills, said:

> "I cannot see how this ordinance, and especially the provision in sections 4, 5 and 6, requiring permission of the owner of property before putting handbills or advertising on it, can be said to violate the right of a free press.
>
> "Freedom of the press is a part of that freedom of expression which includes free speech.
>
> "The right to speak freely does not imply the right to force one's speech on another's private premises.
>
> "As I stated at the trial, no constitutional principle gives one the right to stand on my front lawn and deliver a speech to whomever may listen. Pragmatic American speech disposes of any such claim by the familiar expression 'go and hire a hall'. This is also sound constitutional doctrine.
>
> "In like manner, the right to distribute literature and pamphlets does not imply the right to 'force' acceptance by placing them on another person's premises without his permission.

> "Governmental agencies may protect a property owner in the enjoyment of his property. They may ward off those who would annoy him, by trespassing on it in one way or another. These are verities a la Palisse. See note, Freedom of the Press, 1939, 12 So. Ca. Law Rev. 466."

See also:

People v. *Kuc*, 272 N. Y. 72.

Likewise in *Town of Green River* v. *Fuller Brush Co.*, 65 Federal Reporter, Second Series 112, the court said:

> "It has been uniformly held that while legislative authority may not arbitrarily interfere with the private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law making power, and if the regulation operates uniformly upon all persons similarly situated and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially declared to be in contravention of constitutional rights."

The local authorities (the Village Board of Southampton) are perhaps the best judges of the necessity for the enactment of such an ordinance and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred (*Schmidenger* v. *Chicago*, 226 U. S. 578).

It has been uniformly held that a considerable latitude shall be allowed to the legislative bodies in determining the classification of matters or persons which are the subject of regulation and that the regulatory statute is not arbitrary if founded upon a reasonable distinction (*American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Brown Foreman Co.* v. *Kentucky*, 217 U. S. 563). Likewise equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way (*Dominion Hotel* v. *Arizona*, 249 U. S. 265).

Petitioners have cited many cases decided by this and other courts wherein allegedly similar ordinances have been adjudged null and void. Each of them involves a regulatory ordinance which gives some public officer the power of censoring or licensing or refusing to license the distribution of pamphlets and pamphleteering—quite a different situation from that existing in Southampton, where all that is regulated is the entry upon private residential property, the prerequisite for which is the consent of the occupant thereof.

In Southampton the individual may determine for himself whether or not pamphlets may be distributed or circulated on his premises and whether or not a stranger may enter upon his property to impose his religious beliefs upon the occupant. Our Constitution guarantees to no one the privilege of entering upon private property under any such guise.

To permit petitioners, or others, to invade private residential property at will would be an abuse of constitutional privilege and would take away from the individual the right of privacy which is entitled to all the protection the law can give. Such unrestrained abuse of civil liberties would result in the loss of liberty itself, were it not for the existence of organized society maintaining public order (*Cox* v. *New Hampshire*, 312 U. S. 569).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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